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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 144

HONOLULU PLANTATION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 461-504) is reported at 72 F. Supp. 903. The opinion of the Court of Appeals (R. 1626-1642) is reported at 182 F. 2d 172.

JURISDICTION

The judgment of the Court of Appeals was entered April 24, 1950 (R. 1643-1644). The petition for a writ of certiorari was filed June 24, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

Petitioner used lands owned and under lease for the growing of sugar cane and the manufacture of sugar. Some of the leased lands were condemned by the United States.

1. The principal question presented is, assuming that petitioner can recover "severance damages" at all, whether it has proved that on condemnation its remaining properties diminished in value at the rate of $1,000 for each acre taken.

2. If such "severance damages" are proved, the next question presented is whether petitioner, whose lease provided for automatic termination on condemnation and for payment to the lessor of the full compensation due by reason of the taking, may nevertheless recover such damages by virtue of a lease provision purporting to reserve to the petitioner claims against the condemnor for "severance damages" to its remaining lands.

STATEMENT

The petitioner operates a plantation, located on the island of Oahu in Hawaii, on which it grows sugar cane and converts it into sugar (R. 461, 530, 574). A small part of the plantation consists of land held in fee, the major portion being leased from others or worked under temporary arrangements (R. 461, 530, 1627). Between June 21, 1944, and December 6, 1945, the United States instituted 13 suits to condemn, on behalf of the Navy, land used by petitioner. These actions concerned a few

acres owned by petitioner in fee, but mainly involved parcels held under lease or used under other arrangements for cane-growing. When the first suit was commenced, the company was using almost 4300 acres for the growing of cane. (R. 461, 552, 586, 687.) The 13 suits condemned about 1087 acres of this growing area (R. 462, 687).

So far as they affected petitioner, the 13 suits were consolidated (R. 433, 459). They were tried by the judge without a jury (R. 462). Petitioner held leases to some 488 acres (R. 496-497), and maintained it had contracts to lease the remaining 595 acres not held in fee. The leases provided that in the event of condemnation

> the estate and interest of the Lessee in the part of the premises taken shall at once cease and determine and the Lessee shall not by reason of such taking be entitled to any claim either against the Lessor or others for compensation or indemnity for the taking of any land or water * * * and all compensation payable to or to be paid by reason thereof shall be payable to and be the sole property of the Lessor, and the Lessee shall have no interest in or claim to such compensation or any part thereof whatsoever * * * [R. 1633, 1443-1444, 1468-1469, 1500-1501].

The leases covering most of the leased land (some 440 acres) also provided in the same clause

> that if such taking shall so affect the remaining premises held by the Lessee under this

> lease, or so affect the operation of the Lessee's remaining lands and tenancies or the business being conducted thereon as to cause substantial damage to the Lessee, then and in that event the Lessee shall have the right to present and pursue its claim for damages and be compensated therefor so long as such action or the payment of such damages shall not affect nor diminish the compensation payable to the Lessor upon condemnation as provided for in this lease [R. 1633, 1443-1444, 1468-1469, 1500-1511].[1]

Because of these lease provisions, petitioner made no claim for any part of the value of any of the lands taken, except for the few acres owned by it outright.[2] The value of the 1087 acres owned by others was paid to these former owners. The company contended, however, that the worth of its remaining property was diminished by the taking of this acreage, and that therefore it was entitled to "severance damages."

In support of this claim, it presented the following evidence:—The cane grown on the original 4300 acres could be converted into 22,000 tons of raw sugar (R. 569, 689, 1050). The 1087 acres taken by the Government could not be replaced (R. 1063), and the remaining acres would produce only 15,000 tons (R. 570-571, 689, 1050). Conse-

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[1] The full clause is set out in the opinion of the Court of Appeals at R. 1633.

[2] No question has been presented to the Court of Appeals, or to this Court, concerning the lands held in fee by petitioner, which were condemned.

quently, the refinery, which could produce annually from 30,000 to 35,000 tons of raw sugar (R. 567), had even more surplus capacity than before.

Petitioner then produced three witnesses (Austin, Schmutz, Crozier) to evaluate the claimed damage for the "loss" of the 1087 acres. None had physically appraised the properties. But each valued the plantation at about $1,000 per acre of cane-growing lands. (R. 606, 687, 688, 736, 739, 873.) They first testified to its value before the taking: Austin, who thought that at that time there was about 4300 acres of cane lands (R. 552), valued the plantation at about $4,300,000 (R. 582; see R. 578). Schmutz, on the assumption of 4283 acres (R. 687), valued at $4,200,000 (R. 686). On the basis of 4,400 acres, Crozier believed it was worth $4,000,000 (R. 873). Next, testifying as to value of the plantation after the loss of the 1087 acres, each concluded it was then worth about $1,000,000 less than before (R. 582-583, 687, 890).

The witnesses explained their use of the $1,000-an-acre figure in valuing the worth of cane-sugar plantations, as follows:—Austin said it was "more or less the rule of thumb" (R. 606). Schmutz testified it was the "common notion in the community regarding the investment in irrigated cane lands per acre, which was $1,000 an acre for plantations which did not have a refinery * * *" (R. 688). Crozier thought that "the 30, the 25,000 ton plantation, as a leasehold, would require * * * a thousand dollars per acre of capital to carry on

its enterprise, starting with the virgin land * * * and weeding it, fencing it, and the ditches and everything else that goes with the enterprise" (R. 873).

The District Court recognized that the claimed loss appeared *prima facie* to be a non-compensable capital or business loss (R. 489-490), but it reluctantly felt compelled to conclude, on the basis of the testimony of petitioner's witnesses, that the Government's takings had depreciated the market value of the property remaining in petitioner's plantation by $1,000 an acre taken (R. 490-491). It said (R. 489-491):

> Here, to say the least, the situation is confusing. First, the evidence reveals that this claim formed a part of a larger claim made to the 79th Congress, and [petitioner] represented to Congress in unmistakable language that it was asking for relief at its hands because it had suffered a capital or business loss for which it had no remedy at law.[3]
>
> Secondly, though a prudent buyer, to be sure, would take general note of all the factors mentioned by the experts [Schmutz and Crozier], nevertheless stripped of all the generalities, the experts essentially base their judgment upon the same point as the former plantation manager [Austin], that is, all said

[3] The petitioner's claim, to which the court was referring, is not in the printed record. A report of the Committee on Claims of the House of Representatives, and accompanying letters, is found at R. 1542-1566.

that [petitioner] suffered a capital loss at the rate of $1,000 per cane acre as it takes that number of dollars to turn virgin land into land capable of growing sugar cane successfully. Thus far, as before Congress, [petitioner] is talking the language of a capital loss. But there [petitioner] takes a step beyond, and

Thirdly, envelopes itself in the language of [*Baetjer* v. *United States,* 143 F. 2d 391 (C.A. 1), certiorari denied, 323 U. S. 772]. At this point the witnesses, carrying forward the picture of what has happened, theoretically place what is left upon the block in the market place and then, viewing it from the eyes of a buyer, say with the First Circuit Court that it is not worth the amount of invested capital which it represents but something substantially less, and therefore what has happened to [petitioner] has depreciated the value of its remaining property.

It would seem that as if by magic a non-compensable capital loss has now become a loss of real property value. * * *

Although not a little disturbed by the facility by which an admitted capital or business loss is transformed into a loss of real property value, theory must yield to the reality of the market price where values are established. * * * Considered in this practical light, I am satisfied by the evidence that [petitioner] has proven its claim that its remaining property decreased in value at the rate of $1,000 an acre for each cane acre taken.

The trial court found that the company had had substantial leasehold estates in some 440 acres, under terms permitting it to claim these alleged "severance damages" (*supra,* pp. 3-4), and it entered judgment against the United States for $440,175 (R. 496-497, 504-507). As to 595 acres (owned by the Damon Estate), it found that petitioner had no legal estate or interest at all, and it refused to impose any damages as a consequence of the taking of that acreage (R. 497-503).

The United States appealed (R. 508). Petitioner also appealed from the refusal of the trial court to allow it an additional $595,010 (R. 509). The Court of Appeals, affirming the disallowance (R. 1628-1632), dismissed petitioner's appeal (R. 1643).[4] It reversed the portion of the judgment from which the United States appealed and remanded the cause for further proceedings (R. 1643-1644).

ARGUMENT

1. It is clear that the District Court's reluctant award of alleged "severance damages" was wholly unjustified, and the Court of Appeals did not err in rejecting it. Severance damages constitute part of just compensation when the taking of part of a parcel of land results in a diminution of the value of the remaining land. *Bauman* v. *Ross,* 167 U. S. 548, 574; *Sharp* v. *United States,* 191 U. S. 341, 351-352, 354; *United States* v. *Grizzard,* 219 U. S.

[4] Petitioner does not seek review here of the dismissal of its appeal.

180, 183-185; *United States* v. *Miller,* 317 U. S. 369, 376. But in the case at bar there was no evidence that the *remaining land* was diminished in value by the takings. In the first place, the testimony simply was that the larger plantation that existed before the condemnations would sell for more—$1,000 an acre more—than the smaller one that remained after the condemnations. Since, according to the witnesses, the value of the plantation diminished at an exact rate per acre as the plantation lost land (*supra,* pp. 4-5, 6), it would appear that the remainder, standing alone, was worth as much as when it had been part of the larger plantation, and consequently that the damages claimed were really on account of the *lands taken.* Put otherwise, the very fact that the total value of the plantation was reduced $1,000 for each acre that was taken indicates that, if the $1,000 represented any land value at all, it represented the value of the acre taken and not diminution in the value of the remainder.[5] The court below properly held that "there was no finding that the remainder of Plantation's property suffered a loss in market value by virtue of the taking of the leaseholds. Nor could there by any." (R. 1637.)

[5] In any case, it is difficult to see how the application of such a mechanical formula could lead to a correct ascertainment of value. Cf. *Minnesota Rate Cases,* 230 U.S. 352, 434. When regard is had to the diverse character of the congeries of properties included in the plantation (see Pet. 3), it is manifest that the value of the whole could not be reached by applying a flat rate per acre.

Secondly, the alleged harm was plainly not a loss in land-values at all; it was nothing more than the loss to petitioner's refining business which allegedly occurred because it was unable to secure sufficient substitute cane-growing areas to keep its mills fully supplied (R. 1631). Such consequential business losses—whether they be due to loss of profits, of "going-concern value", the expense or impossibility of relocation, or damage to good will—are not compensable when the whole fee is taken, as here. *Mitchell* v. *United States,* 267 U. S. 341, 345; *Joslin Co.* v. *Providence,* 262 U. S. 668, 675; *United States ex rel T.V.A.* v. *Powelson,* 319 U. S. 266, 281-282; *United States* v. *Petty Motor Co.,* 327 U. S. 372, 377-378; *Kimball Laundry Co.* v. *United States,* 338 U. S. 1, 11-12, 14-15.[6] The trial court's apparent holding that this business loss was somehow transformed into a compensable diminution of value in the company's remaining leaseholds and fee property (R. 489-491), simply because the petitioner's witnesses said that this was so, was patently erroneous, and the Court of Appeals did not commit error in setting aside the valuation (R. 1631-32, 1637).

Thirdly, as both the District Court (R. 489) (*supra,* pp. 6-7) and the Court of Appeals (R. 1635) suggested, the claimed loss also seems to represent the monies expended by petitioner in developing

[6] Contrary to petitioner's contention (Pet. 6-9), the *Kimball Laundry* decision enunciates a principle applicable only in temporary takings (338 U.S., at 15), and therefore not relevant where, as here, the interest of the former owner is extinguished.

the condemned lands. The $1,000-an-acre figure used by its witnesses approximated this investment. But this investment loss on the *taken* properties is certainly not recoverable under the "severance damages" proviso of the leases, which refers only to damage to, or loss on, the *remaining* lands and properties. See *supra,* pp. 3-4. Petitioner seeks recovery only under that proviso. It has admittedly relinquished all interest in the condemned land itself and all right to recover any part of its value (Pet. 17). *Supra,* pp. 3-4.

2. Since petitioner has not proved that it suffered any compensable "severance damages," it is, of course, immaterial whether or not the condemnation clauses in its leases could properly reserve to it the right to claim such damages, and that issue need not be reached. If the question is mooted, however, it is our view that the Court of Appeals correctly held, as an alternative ground of its decision, that, in the circumstances of this case, petitioner was barred by the special terms of its leases from claiming any damages on account of the taking of the lands in which it formerly had a leasehold interest (R. 1632-1636). For it is settled that petitioner is entitled to compensation only if its own property interest is taken (*United States* v. *Willow River Co.,* 324 U. S. 499, 502), and the leases make it plain that on condemnation its entire estate automatically terminated, that all compensation payable "by reason of" the taking became payable to the Lessor and would be its sole

property, and that petitioner would not "by reason of such taking be entitled to any claim either against the Lessor or others for compensation or indemnity for the taking of any land or water * * * ". *Supra,* p. 3. In such a case, as this Court has already held, "the tenant has no right which persists beyond the taking and can be entitled to nothing." *United States* v. *Petty Motor Co.,* 327 U. S., 373, 375-376; and cases cited in the opinion below at R. 1634, fn. 7. All rights are vested in the lessor, and he is entitled to whatever compensation is to be paid.

The addition of a clause purporting to save to the lessee its right to damages if the taking affected its other lands or the operation of its business—always provided, it is to be noted, that the lessee's claim "shall not affect nor diminish the compensation payable to the Lessor upon condemnation as provided for in this lease"—can avail this petitioner nothing. Under the broadest interpretation of the "severance damages" principle, damages for injury to lands remaining after condemnation can be collected only as a consequence of the taking of some property right from the claimant. The Fifth Amendment does not require compensation for any indirect losses to the claimant's business or property resulting from the condemnation of another's land or property. *Campbell* v. *United States,* 266 U. S. 368, 371; *United States* v. *Miller,* 317 U. S. 369, 375-376; *Mitchell* v. *United States,* 267 U. S. 341, 346; *Baetjer* v. *United States,* 143

F. 2d 391, 395-396 (C.A. 1), certiorari denied, 323 U. S. 772; cf. *United States* v. *Willow River Co., supra.* Since petitioner no longer had any interest or estate in the lands formerly leased (R. 1641), and had expressly agreed that the lessor was to receive full compensation, it could not by private agreement fasten liability on the United States for alleged harm to its remaining plantation.[7] Only an act of Congress could effect that result. In this proceeding, the 440 acres covered by this type of lease were thus in precisely the same class as the 49 acres under a lease omitting the proviso as to "severance damages" (R. 496-497), and the 595 acres owned by the Damon Estate which petitioner used but in which it had no legal estate or interest (R. 497-503, 1628-1630). As in those instances, the District Court should have refused to peg any damages to the other lands used by petitioner onto the Government's taking.

3. There is no conflict with *Baetjer* v. *United States,* 143 F. 2d 391 (C.A. 1), certiorari denied, 323 U. S. 772. That case involved lands held in

[7] The possibilities of the Government's having to pay full compensation twice, if an agreement of the type of the condemnation clause in petitioner's leases can be enforced against the United States, are apparent in the wording of the clause (R. 1633, *supra*, pp. 3-4) which carefully preserves "all compensation" payable "by reason of" the taking to the owner, and also provides that any recovery by the ex-lessee "shall not affect nor diminish the compensation payable to the Lessor upon condemnation as provided for in this lease." It is significant, in this case, that the lessors may also have been the fee-owners of other lands remaining in petitioner's plantation. See *supra*, pp. 2, 3-4. See, also, the opinion below, R. 1636, 1641.

fee and not leaseholds, and there was no clause similar to the lease-termination clause present here. And on the primary issue of alleged "severance damages", the First Circuit expressly held that business losses resulting from a taking of part of the claimant's lands were not recoverable. 143 F. 2d, at 395-396. It recognized, it is true, that if proof were made of a real diminution in value of the remaining lands (as distinguished from a business loss) compensation should be allowed. But, as we have shown (*supra,* pp. 8-11), the present facts preclude such a finding, just as on the remand of the *Baetjer* case the District Court held that the injury suffered by that sugar refinery, on the taking of part of its property, was a non-compensable business loss. *United States* v. *7936.6 Acres of Land, etc.,* 69 F. Supp. 328 (D. P. R.). Far from being in conflict with the First Circuit, the opinion of the court below (R. 1640-1641) shows that it is in complete accord with the *Baetjer* case on the principle of law involved.[8]

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[8] Since the decision of the court below is correct for the two separate reasons that (a) no proof of properly compensable "severance damages" was made, and (b) the particular lease-termination clause barred all recovery, it is unnecessary to discuss the third alternative holding below that "severance damages" are allowable only in the case of full fee-takings, and when the same person holds the fee of the land taken and of the remainder (R. 1630, 1637-1641). It is sufficient to note here that, as petitioner concedes (Pet. 9, 11), the federal courts have never held otherwise.

CONCLUSION

The decision of the court below is clearly correct and the case does not warrant further review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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